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ASPECTS OF THE ADMINISTRATION OF  
CRIMINAL JUSTICE UNDER THE LAW OF SOUTH AFRICA:  
NOTES AND COMPARISONS BY  
AN AMERICAN OBSERVER

*by*

*George W. Pugh\**

I. BACKGROUND

SOUTH Africa is a "mixed" jurisdiction, in the sense that its legal system derives from both the English common law and the Roman-Dutch law.<sup>1</sup> In various areas the influence of one or the other of these systems has been particularly dominant; as to the law of criminal procedure and evidence, the English common law has exerted by far the greater influence. Thus in South Africa as in the United States, the mother law in this area is basically English.<sup>2</sup>

Although adjective law generally does not change rapidly, it does change—responding to the ideas and needs of those who have the power and inclination to change and mold the law. At times the change, even of adjective law, is rapid and extensive, due to the social, political, and philosophical conditions of the times. In the America of the sixties changes in the law governing the administration of criminal justice, effected in the main by judicial interpretation, have been so rapid that it has been difficult at times for the average lawyer to keep fully informed, and yet so significant that the changes have become the subject of heated general discussion, even in the last presidential campaign.

However controversial particular changes in our system are and have been, it is important to note that they have been primarily developmental, not revolutionary, in character. They reflect an attempt to make the administration of criminal justice comport with

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<sup>1</sup> See Hahlo and Kahn, *South Africa: The Development of Its Laws and Constitution* (1960) [hereinafter cited as Hahlo and Kahn].

<sup>2</sup> Strauss, *The Development of the Law of Criminal Procedure Since Union*, 1960 *Acta Juridica* 157, 157-159 [hereinafter cited as Strauss].

the historical American political ideal of equal justice under the law for all, without regard to race, color, creed, national origin, or economic or social condition. They reflect great concern lest the dignity of the individual be improperly undermined, his privacy unduly invaded. To say this is not necessarily to approve each of the recent changes but rather to recognize that the *thrust* of the reforms has been to achieve basic political and philosophical goals.

In the zeal to implement philosophy, pay the proper respect for the dignity and worth of the individual, and protect his privacy, perhaps the recent decisions at times go too fast, or too far. There are dangers inherent in freezing current notions as to the desirable procedural rule into constitutional "changeless form." But these are questions quite beyond the scope of the instant Article. Perhaps some of the decisions which attempt to make police practice comport with legal ideals are too theoretical and impractical, unduly thwarting the policeman in his attempt to afford the protection society needs, but this again takes us too far afield. What the writer is attempting to say here is that in the United States, building on our traditions, we are undergoing rapid developmental changes, designed to put into police and judicial practice the ideals of our nation and our age.

In South Africa, too, changes in this area of the law are being effected—more by the legislature, however, than by the courts.<sup>3</sup> Especially since World War II, both countries have been experiencing the tensions resulting from the world-wide movement towards the realization in practice of egalitarian theories. In South Africa the government has taken stern steps to secure continued separation of the races (*apartheid*)<sup>4</sup> and to counter those opposed to it, whereas in the United States the movement has been in the direction of the realization through law of current egalitarian notions.

In South Africa as in the United States the changes have been developmental in character, building on historical institutions, the traditions of the past.<sup>5</sup> Much has been written about South African *apartheid*,<sup>6</sup> and this Article is not an attempt to retrace those steps

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<sup>3</sup> In Strauss, 160, it is stated:

There must be few branches of South African statutory law in which the Legislature has been more energetic in the past five years than that of criminal procedure. Up to and including the 1960 Parliamentary session the Criminal Procedure Act was amended no fewer than nine times. In 1959 alone it was amended three times. [Footnote omitted.]

<sup>4</sup> The government of South Africa now talks more in terms of "separate development" and "separate freedoms" than "*apartheid*."

<sup>5</sup> See Davenport, *Civil Rights in South Africa, 1910-1960*, 1960 *Acta Juridica* 11.

<sup>6</sup> See Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 *Yale L.J.* 1 (1961); Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 *Yale L.J.* 437 (1962).

or to analyze current political and philosophical attitudes in either country. It is rather an attempt to give a brief discussion of developments in South Africa, in their context, as to some of the areas of criminal procedure which have been particularly controversial in the United States.

It would be improper to overemphasize the impact of racial problems and egalitarian urges on criminal procedure generally. In many respects South African rules of criminal procedure and evidence are strikingly similar to our own, both grounded in the English common law. Many of the differences between our two systems are traceable to factors completely extraneous to the controversial subjects mentioned above. The tensions of the day, however, have their impact.

Of a total South African population of about fifteen million in 1960, the European segment comprises approximately twenty-one per cent.<sup>7</sup> Except for four Europeans elected to the House of Assembly by a non-European segment of the Cape Province, the non-Europeans (the remaining seventy-nine per cent of the population) have no vote in the selection of members of Parliament.<sup>8</sup> The European population is itself divided (by tradition, language, and to a large extent by political and racial attitudes) into two mother-language groups—Afrikaans (approximately sixty per cent) and English (approximately forty per cent). The Afrikaans and English languages are accorded equal dignity, and a very high percentage of the European population is bilingual.

Largely Afrikaans-dominated and supported, the government apparently feels that its overriding problem is the survival of the white man and his culture in South Africa. Liberal traditions, however, run deep, especially among the English language group and in the mother province (the Cape). Particularly as reflected in the English press, opposition to governmental policies is articulate and persistent.

## II. CIVIL RIGHTS AND THE CONSTITUTION

In 1961 the Union of South Africa became the Republic of South Africa and left the Commonwealth. There is nothing in the Constitution of the new Republic similar to our Bill of Rights securing constitutional protection for civil liberties.<sup>9</sup> Parliament,

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<sup>7</sup> Hahlo and Kahn, xxii-xxiii.

<sup>8</sup> *Id.* at 163-169.

<sup>9</sup> The Natal Provincial Council had urged the incorporation of such guarantees but without success. Kahn, *The New Constitution 2* (1962), a supplement to Hahlo and Kahn, *South Africa: The Development of Its Laws and Constitution* (1960).

under the Constitution, is all powerful;<sup>10</sup> it is expressly given the power even to repeal and amend provisions of the Constitution,<sup>11</sup> itself an ordinary act of Parliament. The courts are specifically enjoined from inquiring into the validity of Parliamentary Acts<sup>12</sup> except as to an act impinging upon the constitutional provision relative to equality between the English and Afrikaans languages.<sup>13</sup>

The absence of constitutionally-protected civil rights and the existence of an all-powerful Parliament accord to a large extent with South African law prior to the Republic.<sup>14</sup> The system affords a flexibility for statutory innovation not possible under our constitutional limitations, but the dangers to civil liberty and individual freedom are evident.<sup>15</sup>

### III. COURTS, JUDGES AND MAGISTRATES, BAR AND SIDE BAR

Generally, it is within the discretion of the prosecution whether a particular criminal case will be tried before the Supreme Court (superior court) or a district or regional magistrate's court (inferior courts). Murder, treason, and sabotage cases, however, are triable only in the Supreme Court.<sup>16</sup> Rape cases occupy a special category, for although triable by a regional magistrate's court, the defendant may insist on trial by the Supreme Court.<sup>17</sup> Aside from the above, inferior courts are competent to try any criminal case but are limited as to the sentences they may impose. The most serious cases, therefore, are generally tried in the Supreme Court, but the over-

<sup>10</sup> Republic of South Africa Constitution Act, Act No. 32, § 59 (1961), provides:

(1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.

(2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section one hundred and eight or one hundred and eighteen.

<sup>11</sup> There is a limitation, however, as to the parliamentary procedure to be employed. To alter the constitutional provisions as to the equality between the English and Afrikaans languages, a two-third vote of the total membership of the two houses sitting together is required. Republic of South Africa Constitution Act, § 118 (1961).

<sup>12</sup> See note 10 *supra*.

<sup>13</sup> See note 11 *supra*.

<sup>14</sup> See Hahlo and Kahn, 136-163.

<sup>15</sup> It should be noted in passing that in England, where there is also parliamentary supremacy, the much-lauded liberties of the English subject have grown and flourished. For an excellent discussion of the rule of law in England, the United States, France, and South Africa see Beinart, *The Rule of Law*, 1962 Acta Juridica 99.

<sup>16</sup> Act No. 32, § 89 (1944). Since sabotage carries a minimum sentence of five years' imprisonment, Act No. 76, § 21 (1962), it is beyond the jurisdiction of the magistrates' courts. Act No. 12, § 92 (1944), as substituted by Act No. 16, § 1 (1959).

<sup>17</sup> Rape cases may not, however, be tried by a district magistrate's court. Act No. 32, § 89(2) (1944), as inserted by Act No. 75, § 1 (1959), discussed in Swift and Harcourt, *The South African Law of Criminal Procedure* 161 (1963 supp.).

whelming majority of criminal cases are tried in the inferior courts. Professor Kahn tells us that in 1954 only 0.3 per cent of criminal prosecutions were in the Supreme Court.<sup>18</sup>

The magistrates who staff the inferior courts are civil servants and frequently are occupied with administrative as well as judicial duties. There is no requirement that the magistrate have had formal law school training, a matter for considerable misgivings. Generally, they are persons who have come up through the ranks of the civil service,<sup>19</sup> having passed a civil service examination on law.<sup>20</sup> Frequently the magistrate has served previously as prosecutor,<sup>21</sup> and there seems to be general concern that because of this and his public service training he is too much inclined towards the prosecution. Although there is authority for the use of assessors to assist the magistrates, this rarely occurs;<sup>22</sup> and as noted hereafter, no juries are employed in the inferior courts.<sup>23</sup> The vast majority of the defendants in the inferior courts are unrepresented by counsel.<sup>24</sup>

The problems inherent in such a system are obvious. It should be noted, however, that it would be very difficult to staff the inferior courts from outside the Civil Service,<sup>25</sup> and that a meaningful safeguard as to rights of the defendants is afforded in a procedure by which many cases tried by district magistrates' courts are automatically reviewed by a justice of the superior court.<sup>26</sup> Unfortunately, because of the work loads, such review of decisions of regional magistrates' courts was discontinued.<sup>27</sup> To minimize prosecution bias, promotion of magistrates is on the recommendation of a committee of senior magistrates.<sup>28</sup>

The judges of the superior courts form an elite group, generally

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<sup>18</sup> Hahlo and Kahn, 258.

<sup>19</sup> It was only in 1957 that their classification in the civil service was changed from administrative to professional rank. Hahlo and Kahn, 274.

<sup>20</sup> Hahlo and Kahn, 273. To be named a magistrate of a regional magistrate's court a person must have passed a more rigorous examination and served at least ten years as a magistrate.

<sup>21</sup> Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1962 Annual Survey of South African Law 475, 485; Hahlo and Kahn, 274.

<sup>22</sup> South African Crim. Proc. Act, Act No. 56 (1955) [hereinafter cited as S.A. Crim. Proc. Act] § 93 *ter*; Swift and Harcourt, *The South African Law of Criminal Procedure* 610 (1957) [hereinafter cited as Swift and Harcourt]. See also the discussion accompanying notes 69-97 *infra*.

<sup>23</sup> See text accompanying notes 69-97 *infra*.

<sup>24</sup> See the discussion on right to counsel accompanying notes 50-68 *infra*.

<sup>25</sup> Hahlo and Kahn, 274.

<sup>26</sup> Magistrates' Courts Act, Act No. 32, §§ 96-99, (1944) (reproduced in Swift and Harcourt, 612-622); Memorandum: *On the System of Automatic Review and the Punishment of Crime*, 79 S.A.L.J. 267 (1962).

<sup>27</sup> Hahlo and Kahn, 263-264. The regional magistrate's court has more extensive powers of sentencing, and its magistrates must meet higher qualifications.

<sup>28</sup> Hahlo and Kahn, 275.

greatly respected for ability and integrity. They are appointed by the State President;<sup>29</sup> and although generally they are considered to be quite independent of politics, recently there have been suggestions that politics has played an undue role in appointments. Usually selected from among the senior advocates ("silks"),<sup>30</sup> the judges of the Supreme Court are usually of outstanding ability. The judges of the country's highest court, the Appellate Division of the Supreme Court, are, with rare exceptions, selected from among the Supreme Court judges.<sup>31</sup>

The South African jurist is by no means the activist that his American counterpart sometimes is. The realistic school of jurisprudence has not had the impact or acceptance in South Africa that it has had in the United States. Also, under the South African Constitution, there is no scope for judicial review of legislation similar to that in the United States—no Bill of Rights, no fourteenth amendment.<sup>32</sup>

As in England, South African lawyers belong to either the Bar or the Side Bar.<sup>33</sup> Members of the Bar, called advocates (corresponding generally to the English barristers), have the exclusive right to appear on behalf of clients in the superior courts. Members of the Side Bar in South Africa, called attorneys, correspond generally to English solicitors. Higher academic qualifications are required for the Bar than the Side Bar, and it seems clear that the advocate enjoys greater prestige than the attorney. There are only some 400 practicing advocates in the whole of South Africa, compared with approximately 3,000 attorneys.

#### IV. PUBLIC AND PRIVATE PROSECUTIONS, POWERS OF THE MINISTER OF JUSTICE

Since 1926 all public prosecutions in South Africa have been under the ultimate control of the Minister of Justice, a member of the Cabinet.<sup>34</sup> Under the express terms of the law<sup>35</sup> attorney-generals<sup>36</sup>

<sup>29</sup> See Millner, *Eclipse of a Judiciary: The South African Position*, 11 Int. & Comp. L. Q. 886 (1962).

<sup>30</sup> Hahlo and Kahn, 265.

<sup>31</sup> *Id.* at 266. On only two occasions, more than thirty years ago, has this occurred.

<sup>32</sup> See notes 9-15 *supra* and accompanying text.

<sup>33</sup> For discussion of the legal profession in South Africa see Hahlo and Kahn, 281-285.

<sup>34</sup> Hahlo and Kahn, 277; Strauss, 166. See S.A. Crim. Proc. Act, § 5(3) (1955), as substituted by Act No. 68, § 45 (1957) and amended by Act No. 92, § 1 (1963).

<sup>35</sup> S.A. Crim. Proc. Act, § 5(3) (1955), as substituted by Act No. 68, § 45 (1957) and amended by Act No. 92, § 1 (1963).

<sup>36</sup> There is an attorney general for each provincial division of the Supreme Court. S.A. Crim. Proc. Act, § 5(1) (1955), as substituted by Act No. 68, § 45 (1957), and amended by Act No. 92, § 1 (1963).

are under the control and direction of the Minister, who is given clear authority to reverse any decision of an attorney-general and even to take over his functions. It was to achieve Parliamentary responsibility, it was said, that such great centralization of power was originally conferred.<sup>37</sup> As a practical matter, of course, it would be completely impossible for the Minister to exercise direct supervision over all public prosecutions, but it would seem that he does exercise effective control over important matters, and thus that criminal prosecutions and governmental policy can be coordinated.

Especially in recent years, the Minister of Justice has been given extensive discretionary powers, often screened from judicial review, making possible severe curtailment of individual freedom and liberty. Although a discussion of his discretionary authority is beyond the scope of the instant article,<sup>38</sup> it should be noted that this frightening power extends to such things as banning and indefinite house arrests,<sup>39</sup> prohibiting assemblies,<sup>40</sup> and ordering continued detention after completion of prison sentence for political crimes.<sup>41</sup>

The conduct of public prosecutions is generally in the hands of career public service personnel. In the inferior courts the prosecutor need not be a member of the Bar but normally has qualifications similar to those required of an attorney. In the superior courts the prosecution is almost invariably handled by a member of the Bar.<sup>42</sup> Usually, however, it is by an advocate in the public service and not a private practitioner.

Public prosecution is not the only way by which a wrongdoer may be brought to justice. If, after having been apprised of the charges against an individual, the attorney-general declines to prosecute, private prosecution is possible.<sup>43</sup> Undertaking such private prose-

<sup>37</sup> Hahlo and Kahn, 277; Strauss, 166.

<sup>38</sup> Brookes and Macauley, *Civil Liberty in South Africa* 61-63, 67-69 (1958); Molteno, *The Assault on Our Liberties* (published by South African Institute of Race Relations, 1959).

<sup>39</sup> Act No. 44, § 10 (1950), as inserted by Act No. 76, § 8 (1962); see *Minister of Justice v. Hodgson*, 1963(4) S.A. 535(T).

<sup>40</sup> Act No. 44, § 9(3) (1950).

<sup>41</sup> Act No. 37, § 4 (1963).

<sup>42</sup> S.A. Crim. Proc. Act, § 6 (1955); Swift and Harcourt, 36.

<sup>43</sup> S.A. Crim. Proc. Act, § 14 (1955). According to S.A. Crim. Proc. Act, §§ 11 and 12 (1955), the following persons are authorized to undertake private prosecutions:

11. In any case in which the attorney-general declines to prosecute for an alleged offence—

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; or
- (b) a husband, if the said offence was committed against his wife; or
- (c) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward; or
- (d) the wife or child or, if there is no wife or child, any of the next of



cution, however, is not without responsibilities and risks.<sup>44</sup> At any time during the course of a private prosecution, an authorized public official may intervene and take over.<sup>45</sup> Although private prosecution is relatively rare in practice, it represents a means by which an interested private party, dissatisfied with official determination, may himself undertake prosecution.<sup>46</sup>

Discussion of another interesting, but rarely used, South African procedure is germane here. At the conclusion of a criminal prosecution (whether public or private) terminating in the conviction of the accused, a person injured by the crime may apply to the court for an award compensating him for the injuries he sustained.<sup>47</sup> In such cases the court, in its discretion, may "forthwith" award such compensation. In arriving at its decision it may consider the evidence previously adduced in the case and, in addition, receive further evidence.<sup>48</sup> It is a fascinating procedure, analogous to the civil party practice in some continental criminal procedure systems,<sup>49</sup> and worthy of consideration for adoption elsewhere.

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kin of any deceased person, if the death of such person is alleged to have been caused by the said offence, may, subject to the provisions of sections *fourteen* and *fifteen* prosecute in any court competent to try the said offence, the person alleged to have committed it.

12. Any public body or any person on whom the right to prosecute in respect of any offence is expressly conferred by law, may prosecute in any court competent to try the said offence, the person alleged to have committed it.

<sup>44</sup> The S.A. Crim. Proc. Act, § 17 (1955) provides:

17. A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution conducted at the public instance, save that all costs and expenses of the prosecution shall be paid by the person prosecuting, subject to any order that the court may make when the prosecution is finally concluded.

and § 20 provides:

20. (1) Where a person prosecuted at the instance of a private prosecutor is acquitted, the court in which the prosecution was brought, may order the private prosecutor to pay to the person prosecuted the whole or any part of the expenses (including the costs both before and after committal) incurred by him in connection with the prosecution.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the person prosecuted on his request such costs as it may think fit.

<sup>45</sup> S.A. Crim. Proc. Act, § 18 (1955).

<sup>46</sup> See *Solomon v. Magistrate, Pretoria & Another*, 1950(3) S.A. 603(T) at 609.

<sup>47</sup> S.A. Crim. Proc. Act, § 357 (1955), as amended by Act No. 92, § 43 (1963); § 358, § 359, § 360 as amended by Act No. 93, § 13 (1963); and § 361.

<sup>48</sup> S.A. Crim. Proc. Act, § 357(2) (1955). For an example of the operation of the procedure, see *S. v. Gathercole*, 1964(1) S.A. 21 (A.D.).

<sup>49</sup> See Howard, *Compensation in French Criminal Procedure*, 21 Mod. L. Rev. 387 (1958); and Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 La. L. Rev. 1, 12 (1962), and authorities therein cited.

## V. RIGHT TO COUNSEL

A. *Right To Employ Counsel*

There are very few South African cases, and little discussion in the texts or journals, on the right to counsel. In one of the rare decisions, the court stated: "It is a fundamental right of every South African citizen upon apprehension or arrest by the authorities to obtain legal advice and consult with his legal advisors. This right is so fundamental that in normal circumstances it has never been challenged."<sup>50</sup> It appears that in criminal cases the right would exist even in the absence of statutory authorization,<sup>51</sup> but it is clear that when Parliament sees fit to limit the right, it has the power to do so.<sup>52</sup> The Criminal Procedure Act of 1955 affirms that the "accused" has the right to see his advisors "subject to the provisions of any law relating to the management of prisons or gaols,"<sup>53</sup> the right to the assistance of legal advisors at the preparatory examination,<sup>54</sup> and the right to legal representation at his trial.<sup>55</sup>

In a recent law review article<sup>56</sup> a practitioner indicates that the police often deny counsel access to persons who have been arrested but not yet formally charged. The reason given by the police for such denial, the author states, is that a person held as a "suspect" is not entitled to advice of counsel, the police possibly relying on the notion that until charged a person is not an "accused" within the meaning of the provision referred to above. Although the author argues very persuasively that the police are in error in denying access in such cases,<sup>57</sup> he maintains that as a practical matter legal remedies are inadequate to protect his client's rights.

Persons detained under the "90-day clause," discussed hereafter,<sup>58</sup> have no right to counsel—a flagrant violation of basic rights, but

<sup>50</sup> *Brink v. Commissioner of Police*, 1960(3) S.A. 65(T), 67.

<sup>51</sup> *Id.* at 65; *Swift and Harcourt*, 132, 221.

With respect to right to counsel in another area, however, Professor Beinart states:

The right of legal representation is normal in the ordinary courts, and it is difficult to understand why South African courts have ruled that the right of legal representation which is basic to the judicial process is not one of the essentials of natural justice and therefore need not be allowed by administrative or other agencies conducting inquiries except where expressly or by necessary implication enjoined to do so by statute. Beinart, *The Rule of Law*, 1962 Acta Juridica 99, 120.

<sup>52</sup> *Rossouw v. Sachs*, 1964(2) S.A. 551 (A.D.). See notes 9-15 *supra* and accompanying text.

<sup>53</sup> S.A. Crim. Proc. Act, § 84(1) (1955).

<sup>54</sup> *Id.* at § 84(2).

<sup>55</sup> *Id.* at § 158.

<sup>56</sup> *Wides, An Arrested Person's Right of Access to His Lawyer—A Necessary Restatement of the Law*, 81 S.A.L.J. 513 (1964).

<sup>57</sup> See also *Swift and Harcourt*, 132.

<sup>58</sup> See discussion accompanying notes 173-190 *infra*.

upheld by South Africa's highest court in view of parliamentary supremacy.<sup>59</sup> It should be noted that the clause does not abridge the right to employ counsel at the preparatory examination, or at the trial itself, rights still protected in all criminal cases.

### B. Right To Appointment Of Counsel

The right to employ counsel if one can afford it, however, is of relatively little significance for the person who has insufficient means to exercise the right. If the right is to be meaningful for the indigent, there must be some system, either in law or in practice, by which he can obtain free legal services. In South Africa it seems that the indigent defendant receives insufficient protection in this regard, in law and in practice.

The highest court has stated: "There is no rule of law that a person who is being tried for an offence that may if he is convicted result in a death sentence must, unless he objects, be defended by counsel."<sup>60</sup> Although a matter of grace, not a legal right, the highest court has said that wherever there is a reasonable possibility that the death sentence might be imposed, *pro deo* counsel should be appointed.<sup>61</sup> As noted above,<sup>62</sup> the most serious criminal cases are tried in the superior courts. In the more aggravated of these, indigent defendants usually receive the benefit of *pro deo* counsel at the trial, generally appointed, however, only after a preparatory examination in the inferior court. *Pro deo* counsel receive nominal compensation from the state.<sup>63</sup>

In the inferior courts, where the less serious cases are tried, in-

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<sup>59</sup> See discussion notes 9-15 *supra* and accompanying text.

For discussion of right to counsel with respect to detainees held under emergency regulations issued under the authority of Act No. 3 (1953), the contradictory holdings of the cases with respect to the right to counsel, and the subsequent change in the regulations to make it clear that detainees should be denied right to counsel, see Kahn, *Constitutional and Administrative Law*, 1960 Annual Survey of South African Law 1, 43; and Hepple, *General—Statute Law*, 1960 Annual Survey of South African Law 417, 420-421.

<sup>60</sup> *R. v. Mati and Others*, 1960(1) S.A. 304, 306 (A.D.).

<sup>61</sup> [I]t is a well established and most salutary practice that whenever there is a risk that the death sentence may be imposed, either where that sentence is compulsory unless other factors are present, as in the case of murder, or where the death sentence is permissible by law and the circumstances make its imposition a reasonable possibility, the State should provide defence by counsel if the accused has not made his own arrangements in that behalf. It is disquieting to think that under our system of procedure, of which we are in general justly proud, it is possible for an accused person to be convicted by a Judge sitting alone and be sentenced to death after a trial in which by reason of his poverty he has had to conduct his own defence. 1960(1) S.A. 304 at 306-307.

<sup>62</sup> See discussion accompanying notes 16-33 *supra*.

<sup>63</sup> Hahlo and Kahn, 290. Appeals in these cases seem to be handled in much the same way.

digents rarely receive the benefit of free legal representation. In a report commenting on an inquiry dealing with "the extent to which legal assistance to the poor is justified," the 1958 Annual Report of the Ministry of Justice stated:

The investigation has revealed that such assistance is apparently not necessary in criminal cases. This view is based on the fact that our whole legal system is designed to prevent the conviction of an innocent person, whether he is defended or not, and that it is the duty of judicial officers and prosecutors, who are considered quite capable of doing so, to ensure that no miscarriages of justice occur.<sup>64</sup>

The non-representation of indigents in the inferior courts is somewhat alleviated by the rule that, before imprisonment or corporal punishment may be imposed by the inferior courts, the state must prove (other than by defendant's unconfirmed evidence) that the offense was in fact committed.<sup>65</sup> Also, as noted previously,<sup>66</sup> there is a salutary system of automatic review for certain decisions of the district magistrate's court, for example, where the defendant is fined more than the equivalent of \$140.00 or sentenced to imprisonment for longer than three months.<sup>67</sup> Despite the existence of scattered legal aid bureaus and other devices,<sup>68</sup> including efforts of the Bar, it appears that generally the indigent receives representation only in the most serious cases. It seems that a much more comprehensive system for affording legal assistance for the indigent is greatly needed.

#### VI. MODE OF CRIMINAL TRIAL—JURIES, ASSESSORS, AND SPECIAL COURTS

Since 1910, when the four colonies<sup>69</sup> united to form the Union of South Africa, that vaunted instrument of Anglo-Saxon criminal justice, the jury, has been sliding steadily into oblivion.<sup>70</sup> So far as the writer has been able to ascertain, there are few indeed in South Africa—judge, lawyer, or layman—liberal or conservative—who feel that trial by jury is the most desirable customary mode of trial there.

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<sup>64</sup> Annual Report of the Ministry of Justice 4-5 (1958). See discussion of this by Nathan Abramovitz, sometime Assistant Legal Aid Officer at the Cape Town Legal Aid Bureau, in *Legal Aid in South Africa*, 77 S.A.L.J. 351 (1960).

<sup>65</sup> S.A. Crim. Proc. Act, § 258 (1955).

<sup>66</sup> See discussion accompanying note 26 *supra*.

<sup>67</sup> Magistrates' Courts Act, Act No. 32, §§ 96-99, (1944) (reproduced in Swift and Harcourt, 612-622); Memorandum: *On the System of Automatic Review and the Punishment of Crime*, 79 S.A.L.J. 267 (1962).

<sup>68</sup> See Hahlo and Kahn, 289-291.

<sup>69</sup> The present provinces of Cape, Natal, Orange Free State, and Transvaal.

<sup>70</sup> Hahlo and Kahn, 258-262; Strauss, 164-165. In 1927 civil jury trials were completely abolished. Hahlo & Kahn, 257.

Although the possibility of the complete demise of the jury system has been foreseen by scholars and high governmental officials, the General Council of the Bar has unanimously expressed itself against any further inroads, apparently feeling that although not often used, its optional availability in criminal cases is desirable.<sup>71</sup>

The decline of the jury has resulted from parliamentary enactments, hereafter discussed, and from the general feeling among the Bar that in light of all circumstances jury trial is seldom in the interest of their clients.<sup>72</sup> Instead of trial by jury the usual pattern in the superior courts is trial by a judge sitting with one or two assessors, or by judge alone; in the inferior courts, by magistrate alone (although it is also possible in inferior courts to have trial by magistrate sitting with one or two assessors).<sup>73</sup> As in the past, jury trial is impossible in the inferior courts.

In 1910, at the time of Union, all criminal trials in superior courts, except in the Natal Native High Court, necessarily were by judge and jury.<sup>74</sup> By 1962 only seventy-four (2.5 per cent) of the total 2,951 superior court criminal trials were jury trials,<sup>75</sup> and today the figure is probably even less. The context of law and attitude which produced this remarkable change is fascinating.<sup>76</sup>

The first post-Union encroachment on jury trial came with the 1914 Riotous Assemblies Act, which contained a provision that for the trial of persons charged with violations of the act or treason, sedition, or public violence, the executive could convene a special criminal court consisting of two or three judges to sit without a jury.<sup>77</sup> Today the possibility of trial by such special courts exists with respect to the following crimes: treason, sedition, public violence, and certain violations of the Suppression of Communism Act.<sup>78</sup> The power to order such a trial, however, seems to have been exercised rela-

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<sup>71</sup> Hahlo & Kahn, 260. For an interesting discussion of divergent views on the value of the jury, see the summary of the 1962 parliamentary debates on the motion that "the jury system has no further useful function to fulfill in our administration of justice" in Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1962 Annual Survey of South African Law 475, 489-491.

<sup>72</sup> Hahlo and Kahn, 261-262.

<sup>73</sup> Act No. 32, § 93 *ter* (1944) as inserted by Act No. 14, § 3 (1954). In practice, this rarely occurs. Hahlo and Kahn, 273.

<sup>74</sup> Strauss, 164.

<sup>75</sup> Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1963 Annual Survey of South African Law 573, 588.

<sup>76</sup> For an outline of developments, see Strauss, 164-166, and Hahlo and Kahn, 258-262, upon which much of the following discussion is based.

<sup>77</sup> Similar special courts for the trial of political crimes also existed in the colonies before Union. Strauss, 164.

<sup>78</sup> S.A. Crim. Proc. Act, § 112 (1955), as amended by Act No. 50, § 27 (1956), Act No. 18, § 1 (1958), and Act No. 92, § 10 (1963).

tively rarely.<sup>79</sup> One may wonder whether in providing for the possibility of non-jury trials by a special court for such politically-oriented crimes, Parliament was concerned principally with protecting the accused from the passions of the community, or protecting the state from jury verdicts prompted by undue sympathy for the accused. One might well suspect that the latter motive was uppermost.

In 1910, except in Natal, a unanimous decision was required for verdict.<sup>80</sup> In 1917, when the Criminal Procedure and Evidence Act was adopted,<sup>81</sup> it was provided that a concurrence of seven of the nine-man jury would suffice,<sup>82</sup> and this remains the law today.<sup>83</sup>

The 1917 Code also provided that a defendant could demand to be tried without a jury. The Code stipulated that in such event the judge, in his discretion, could summon two assessors to serve in an advisory capacity.<sup>84</sup> The assessor system apparently proved quite successful, for over a period of time it came to have greater and greater importance.

In 1935 the Minister of Justice was authorized to order a non-jury trial with respect to certain types of crimes, including those where a "non-European" was accused of committing an offense against a "European," or vice versa. Since 1948 the number of crimes where such an order is possible has been broadened considerably.<sup>85</sup>

<sup>79</sup> Hahlo and Kahn, 262, 263.

<sup>80</sup> In Natal, a majority vote sufficed. Strauss, 165.

<sup>81</sup> Act No. 31, § 215 (1917).

<sup>82</sup> Hahlo and Kahn, 258; Strauss, 165.

<sup>83</sup> S.A. Crim. Proc. Act, § 113 (1955).

<sup>84</sup> At that time only magistrates, native commissioners, and justices of the peace were qualified to serve as assessors. Hahlo and Kahn, 258.

<sup>85</sup> S.A. Crim. Proc. Act, § 111 (1955), as amended by Act No. 50, § 26 (1956), Act No. 16, § 12 (1959), and Act No. 39, § 5 (1961), provides:

111. When a person committed for trial is or two or more persons jointly committed for trial are to be tried before a provincial or local division of the Supreme Court upon an indictment charging him or them with having committed or attempted to commit murder or arson or an offence—

- (a) under Chapter I of the Riotous Assemblies and Criminal Law Amendment Act, 1914 (Act No. 27 of 1914); or
- (b) under section *thirty-three* of the Atomic Energy Act, 1948 (Act No. 35 of 1948); or
- (c) relating to illicit dealing in or illegal possession of precious metal or precious stones; or
- (d) relating to the supply of intoxicating liquor to natives or coloured persons; or
- (e) relating to insolvency; or
- (f) in connection with which facts relating to "prescribed material" as defined in section *one* of the Atomic Energy Act, 1948, may have to be considered; or
- (g) in connection with which facts may have to be considered, for the proper understanding of which an expert knowledge of bookkeeping, accounts, geology, mineralogy or metallurgy may be necessary; or
- (h) towards or in connection with a non-European if the accused or any

Although the Minister has ordered non-jury trials in only a small percentage of the total number of superior court cases, the number of such orders is by no means insignificant.<sup>86</sup>

In 1963 attorney-generals were given very broad authority to order that any crime be tried in the superior court without the usual preparatory examination, and an incident of such order is that the trial shall be without a jury.<sup>87</sup> Thus, again, as the result of a discretionary determination by a governmental official, an accused can be prevented from exercising an option to have trial by jury.

By 1954 only 5.6 per cent of the superior court trials in the country were jury trials.<sup>88</sup> In that year Parliament enacted a rule similar to that contained in rule 38 of the Federal Rules of Civil Procedure of our own country: only where a defendant affirmatively demanded a jury trial was this mode to be followed. Interestingly, one of several joint defendants cannot obtain a jury trial unless all codefendants request it.<sup>89</sup> By 1962 only two and one-half per cent of superior court criminal trials were before a jury.<sup>90</sup>

Only Europeans may serve on juries. Although this was the practice previously, it has been the law since 1954.<sup>91</sup> From conversations with a variety of knowledgeable people and from the commentators,<sup>92</sup> it appears that there is a substantial danger from racial prejudice.

of the accused is a European or towards or in connection with a European, if the accused or any of the accused is a non-European;

(i) under paragraph (a) or (b) of section eleven of the *Suppression of Communism Act, 1950 (Act No. 44 of 1950)*;

or with such an offence together with any other offence, the Minister may, by notice served upon the registrar of the court and the accused person or persons, direct that the trial take place before a judge without a jury.

<sup>86</sup> From 1954 to 1958 the number of such orders varied from a low of thirty-five to a high of sixty-two. Hahlo and Kahn, 259. The figure was seven in 1960 and 104 in 1961 (Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1962 Annual Survey of South African Law 475, 490); 4 in 1962 (Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1963 Annual Survey of South African Law 573, 588). The writer was unable to locate figures for 1959.

<sup>87</sup> S.A. Crim. Proc. Act, § 109 (1955), as amended by Act No. 9, § 2 (1958), Act No. 75, § 5 (1959), and Act No. 37, § 10 (1963); § 152 *bis*, added by Act No. 37, § 11 (1963). See discussion in Kahn, *Constitutional and Administrative Law*, 1963 Annual Survey of South African Law 1, 32.

<sup>88</sup> Hahlo and Kahn, 260.

<sup>89</sup> *Id.* at 259-60.

<sup>90</sup> Seventy-four out of 2951 criminal cases. Hunt, *The Administration of Justice, Law Reform and Jurisprudence*, 1963 Annual Survey of South African Law 588.

<sup>91</sup> Hahlo and Kahn, 261; Strauss, 164. For provisions relative to jury qualifications and exemptions see S.A. Crim. Proc. Act, § 114, and § 115 (1955), as amended by Act No. 92, § 11 (1963).

Since 1931 the law has authorized an all female jury where an accused is under the age of eighteen, or a woman, and so requests. We are told, however, that only once was such a request made, and then unsuccessfully (because female enrollment is voluntary and there were insufficient female names on the list). Hahlo and Kahn, 261. Aside from this possibility, all jurors must be males. S.A. Crim. Proc. Act, § 114 (1955).

<sup>92</sup> See Hahlo and Kahn, 260-262; Strauss, 164, and authorities therein cited.

The writer was told by one South African that whereas Americans feel that in the United States the prejudices of the various jurymen cancel each other out, in South Africa the prejudices all run in the same direction. On the other hand, and this seems to be a large factor militating against requests for jury trials, there is generally a very high regard for the ability, integrity, and fairness of the South African judge and a general satisfaction with the assessor system.

Although under the terms of the present statute a judge is never required to utilize the services of assessors, the highest court has indicated that it is desirable as a matter of practice in serious cases, especially those in which the death penalty might be imposed.<sup>93</sup> The judge has great discretion as to whom he shall appoint, the statute calling only for persons "who have, in the opinion of the judge, experience in the administration of justice, or skill in any matter which may have to be considered at the trial."<sup>94</sup> In practice it appears that persons appointed fall generally into the following categories: retired magistrates, advocates (barristers), law professors, and, more rarely, laymen with expert knowledge such as engineers or accountants.<sup>95</sup> The institution of the assessor is held in very high esteem by the profession, and because of its importance and interest, the major statutory provision with respect to it is set out in full below.<sup>96</sup>

<sup>93</sup> R. v. Mati and Others, 1960 (1) S.A. 304, 306 (A.D.).

<sup>94</sup> S.A. Crim. Proc. Act, § 109(2) (1955), as amended by Act No. 9, § 2 (1958), Act No. 75, § 5 (1959), and Act No. 37, § 10 (1963).

<sup>95</sup> Hahlo and Kahn, 262.

<sup>96</sup> S.A. Crim. Proc. Act, § 109 (1955), as amended by Act No. 9, § 2 (1958), Act No. 75, § 5 (1959), and Act No. 37, § 10 (1963), reads as follows :

109. (1) In any criminal case pending before a superior court—

(a) in which the Minister has in terms of section *one hundred and eleven* directed that the accused shall be tried by a judge without a jury; or  
(b) in which the Minister has not so directed and the accused has not in terms of section *one hundred and thirteen*, and in accordance with the provisions of that section, demanded to be tried by a judge and a jury;

or

(c) in which the attorney-general has in terms of section *one hundred and fifty-two bis* directed that the accused shall be tried summarily, the accused shall, subject to the provisions of section *one hundred and twelve*, be tried by a judge of the Supreme Court without a jury and as hereinafter in this section provided.

(2) The judge presiding at the trial may summon to his assistance any person who has, or any two persons who have, in the opinion of the judge, experience in the administration of justice, or skill in any matter which may have to be considered at the trial, to sit with him at the trial, as assessor or assessors.

(3) Before the trial the said judge shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict, according to the evidence upon the issues to be tried, and thereupon he or they shall be a member or members of the court subject to the following provisions:

(a) any matter of law arising for decision at such trial, and any question



An additional consideration underlying the fact that jury trials are today so infrequently demanded is that since 1948 the Appellate Division of the Supreme Court (the country's highest court) has had full authority, on application of defendant, to review all superior court cases (jury and non-jury) on fact as well as law, and even to reduce sentences.<sup>97</sup>

#### VII. ARREST, SEARCH AND SEIZURE, AND ILLEGALLY-OBTAINED EVIDENCE

Since 1910, when the Union was established, there have been relatively few changes in the South African law of arrest.<sup>98</sup> Both police and private individuals are authorized to arrest persons whom they have "reasonable grounds to suspect" have committed certain crimes.<sup>99</sup> Although the authority to issue arrest warrants is also phrased in terms of "reasonable grounds of suspicion,"<sup>100</sup> there are few cases dealing with the meaning of these phrases.<sup>101</sup>

Where there is arrest, either with a warrant<sup>102</sup> or without,<sup>103</sup> the law directs that "as soon as possible" the arrested person shall be brought before a judicial officer. Again, there are few cases dealing

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arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judge and no assessor shall have a voice in any such decision;

- (b) the presiding judge may adjourn the argument upon any such matter or question as is mentioned in paragraph (a) and may sit alone for the hearing of such argument and the decision of such matter or question;
- (c) whenever the presiding judge shall give a decision in terms of paragraph (a) he shall give his reasons for that decision;
- (d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judge, in which case the decision or finding of such judge shall be the decision or finding of the court if there is a difference of opinion;
- (e) it shall not be incumbent on the court to give any reasons for its decision or finding on any matter under paragraph (d).

(4) If any such assessor is not a person in the full-time employment of the State he shall be entitled to a refund of any reasonable expenditure which he may have necessarily incurred in connection with his attendance at the trial and to such remuneration for his services as assessor as the Minister in consultation with the Minister of Finance may determine.

(5) The provisions of this Act relating to trials by a superior court shall, in so far as they can be applied, apply to any trial without a jury under this section.

<sup>97</sup> S.A. Crim. Proc. Act, § 363 (1955); Hahlo and Kahn, 255, 261; Strauss, 187.

<sup>98</sup> Strauss, 167-168.

<sup>99</sup> S.A. Crim. Proc. Act, § 22 (1955), as amended by Act No. 16, § 11 (1959) and Act No. 92, § 3 (1963); *id.* at § 24, as amended by Act No. 92, § 4 (1963).

<sup>100</sup> S.A. Crim. Proc. Act, § 28 (1955).

<sup>101</sup> See the cases cited in Swift and Harcourt, 54-55, 61; Gardiner and Lansdown, South African Criminal Law and Procedure 209 (6th ed. 1957) [hereinafter cited as Gardiner and Lansdown].

<sup>102</sup> S.A. Crim. Proc. Act, § 29(3) (1955).

<sup>103</sup> *Id.* at § 27.

with the meaning of the phrase "as soon as possible."<sup>104</sup> With respect to arrests without a warrant, the law specifies that unless a warrant for further detention has been obtained, the arrested person shall not be detained longer than forty-eight hours before being brought before a judicial officer on a charge.<sup>105</sup> It appears that in practice persons are frequently kept for the maximum forty-eight hours and during this period afforded neither opportunity for bail nor access to counsel.<sup>106</sup> It seems fairly clear that despite the Judges' Rules police interrogation of arrested persons during this period is common.<sup>107</sup>

To facilitate investigation of crime there is a provision,<sup>108</sup> added in 1926,<sup>109</sup> authorizing a peace officer to call upon anyone whom he suspects of having committed a crime or who "may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence"<sup>110</sup> to furnish the officer with his full name and address. If under these circumstances the person fails to do so, or furnishes what the officer on reasonable grounds suspects to be false information, then the officer is authorized to arrest and detain him until his name and address can be verified, a period not to exceed twelve hours. The failure to furnish accurate information as to name and address under such circumstances is an offense punishable by a fine and up to three months' imprisonment. This is a potent

<sup>104</sup> Swift and Harcourt, 60; Gardiner and Lansdown, 210, 215.

<sup>105</sup> S.A. Crim. Proc. Act, § 27(1) (1955).

<sup>106</sup> See discussion of bail accompanying notes 122-136 *infra*, and right to counsel accompanying notes 50-68 *supra*.

<sup>107</sup> See Hiemstra, *Abolition of the Right Not to Be Questioned*, 81 S.A.L.J. 187, 205-209 (1964). See notes 137-163 *infra* and accompanying text as to the Judges' Rules and rules regulating the admissibility of admissions and confessions. The fact that evidence was obtained as the result of an illegal detention would apparently not prevent its admissibility. See text accompanying notes 116-118 *infra*.

<sup>108</sup> S.A. Crim. Proc. Act, § 22(3), (4), (5) (1955):

(3) A peace officer may call upon—

(a) any person whom he has power to arrest;

(b) any person reasonably suspected of having committed an offence; and

(c) any person who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address.

(4) If any such person fails on such demand to furnish his full name and address, the peace officer making the demand may forthwith arrest him, and if any such person on such demand furnishes to such peace officer a name or address which such peace officer upon reasonable grounds suspects to be false, such person may be arrested and detained for a period not exceeding twelve hours until the name and address so furnished have been verified.

(5) Any person who, when called upon under the provisions of subsection (3) or (4) to furnish his name and address, fails to do so or furnishes a false or incorrect name and address, shall be guilty of an offence and liable on conviction to a fine not exceeding thirty pounds or to imprisonment for a period not exceeding three months.

<sup>109</sup> Strauss, 167.

<sup>110</sup> S.A. Crim. Proc. Act, § 22(3)(c) (1955).

weapon, no doubt, in a phase of investigation that gives great difficulty in our own country.

Apart from the drastic authority to arrest under the 90-day clause, hereinafter discussed,<sup>111</sup> there are other extreme powers of arrest. Practically unlimited powers of arrest and detention exist when, in the opinion of the government, public safety or public order is seriously threatened<sup>112</sup> and emergency authority invoked.

The powers of search, seizure, and investigation in South Africa are broad indeed. One of the most pervasive authorizations was added by Parliament in 1955.<sup>113</sup> In order that its sweep and impact may be appreciated, it is set forth in full below.<sup>114</sup>

<sup>111</sup> See discussion accompanying notes 173-190 *infra*.

<sup>112</sup> Act No. 3 (1953), as amended by Act No. 62, § 31 (1955), and regulations issued thereunder. See Hahlo and Kahn, 134, and Gardiner and Lansdown, 211, 215.

<sup>113</sup> Act No. 29, § 7 (1955), included in S.A. Crim. Proc. Act, § 44 (1955). Swift and Harcourt, 78-79.

<sup>114</sup> 44. (1) If it appears to a judge of a superior court, a magistrate or justice on complaint made on oath that there are reasonable grounds for believing—

(a) that the internal security of the Union or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being or is about to be held in or upon any premises; or  
(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises,

he may issue a warrant directing a policeman named therein or all policemen to enter the said premises at any reasonable time for the purpose of carrying out such investigations and of taking such reasonable steps as such policeman or policemen may consider necessary for the preservation of the internal security of the Union or the maintenance of law and order or for the prevention of the commission of any offence, and for the purpose of searching such premises or any person in or upon such premises for anything which such policeman or policemen may have reasonable grounds for suspecting to be in or upon such premises or upon such person and as to which he or they may have reasonable grounds for believing that it will afford evidence as to the commission of any offence or that it is intended to be used for the purpose of committing any offence, and to seize any such thing, if found, and to take it before a magistrate.

(2) If any policeman believes on reasonable grounds that the delay in obtaining a warrant under sub-section (1) would defeat the objects of such a warrant, he may himself at all reasonable times, enter the premises concerned without warrant and there carry out such investigations and take such reasonable steps as he may consider necessary for the preservation of the internal security of the Union or the maintenance of law and order, or for the prevention of the commission of any offence, and if he has reasonable grounds for suspecting that there is in or upon the said premises or upon any person in or upon the said premises anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence or that it is intended to be used for the purpose of committing any offence, he may without warrant search such premises or such person for any such thing and may seize such thing if found and take it before a magistrate.

(3) Whenever any policeman in the investigation of any offence or alleged offence has reasonable grounds for believing that there is upon any premises any person who is able to give evidence in relation to the commission of that offence, he may without warrant enter the said premises for the purpose of interrogating the said person and for taking a statement from him.

(4) Any policeman may use such force as may be necessary to obtain entry

By another act, the officer in charge of any post office or telegraph office is directed to detain any postal article or telegram reasonably suspected of containing any evidence as to the commission of any offense, or of being sent to further the commission or prevent the detection of any offense. The postmaster-general may then turn over such materials to prosecution personnel.<sup>115</sup>

Although giving rise to various remedies, including in some cases an action for damages against both the offending policeman and the state,<sup>116</sup> the illegality of a search and seizure, arrest or detention has little or no bearing upon the admissibility of evidence thereby obtained,<sup>117</sup> for South Africa follows the common law rule that illegally-obtained evidence is generally nonetheless admissible.<sup>118</sup>

The writer has been unable to discover any reported decisions dealing with the admissibility of evidence obtained as the result of "tapping" telephone lines. There have been suggestions that telephone lines are being tapped and some denials by government officials.<sup>119</sup> If the police engage in wiretapping, it would seem that the taps are used not to obtain evidence for direct use in court but to secure leads to other evidence. It seems clear, however, from what has

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to any premises which he is authorized to enter in terms of sub-section (1), (2) or (3) or to overcome any resistance offered against his entry thereto, and may, if necessary, for that purpose break open any door or window of such premises: Provided that no policeman shall act under this sub-section unless he has previously failed to obtain admission after having audibly demanded the same and notified the purpose for which he seeks to enter such premises: Provided further that nothing in this sub-section or sub-section (3) contained shall authorize a policeman to enter the private dwelling of any person for the purpose referred to in sub-section (3), except with the consent of the occupier of that dwelling.

(5) If a woman is searched under any of the provisions of this section, the provisions of sub-section (3) of section *thirty-six* shall *mutatis mutandis* apply.

(6) Any person who wilfully obstructs, resists or hinders a policeman in the execution of any duty or the exercise of any power under this section, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

<sup>115</sup> Act No. 37, § 13 (1963).

<sup>116</sup> Swift and Harcourt, 60-61; Gardiner and Lansdown, 209, 215-216; Hahlo and Kahn, 194-199; May v. Union Government, 1954(3) S.A. 120(N); Ingram v. Minister of Justice, 1962(3) S.A. 225(W).

<sup>117</sup> For discussion as to the test for admissibility of admissions and confessions see text accompanying notes 137-163 *infra*.

<sup>118</sup> Hoffman, South African Law of Evidence 272-274 (1963); May, South African Cases and Statutes on Evidence 312 (1962); Gardiner and Lansdown, 447, 628. There appear to be no South African cases discussing whether the fact that evidence was illegally obtained would have any bearing upon judicial discretion to exclude, but it has been argued that, in a proper case, it should. Hoffman, South African Law of Evidence 274 (1963). For discussion of violations of the Judges' Rules and discretionary authority to exclude, see text accompanying note 147 *infra*.

<sup>119</sup> See *Bill Seeks Heavy Penalty for Phone Tapping*, The Cape Argus 18 (February 28, 1961); *Telephone tappings are denied again*, The Cape Argus 13 (March 3, 1961); *No tapping of phones by P.O., says Hertzog*, The Cape Argus 1 (June 5, 1962).

already been said that, if available and offered, wiretap evidence would be admissible. At least some electronic eavesdropping goes on,<sup>120</sup> and, at any rate it appears that the fact of eavesdropping would not preclude admissibility of the fruits.<sup>121</sup>

### VIII. BAIL

In 1961 Parliament passed an act authorizing an attorney general, when he "considers it necessary in the interest of the safety of the public or the maintenance of public order," to prohibit any person arrested on a charge of committing any offense from being released on bail "or otherwise" for a period of twelve days from his arrest.<sup>122</sup> In such cases the courts are denied their usual overriding authority to grant bail.<sup>123</sup> As originally enacted this extraordinary power was to be in effect for one year only, but in each succeeding year since then Parliament has enacted one-year extensions.<sup>124</sup> Pending the termination of a preparatory examination instituted against an accused, he has no *right* to be released on bail.<sup>125</sup> As a matter of discretion,<sup>126</sup> however, he may be, and often is.<sup>127</sup>

After a person has been committed for trial or sentence, the general law states that, subject to certain exceptions (murder and treason cases) and certain provisos, the defendant is "entitled" to bail.<sup>128</sup>

<sup>120</sup> *Agent Q043 Tells of Lookout on Alleged Reds*, The Cape Times 17 (December 11, 1964).

<sup>121</sup> See *R. v. Behrman*, 1957(1) S.A. 433(T); *S. v. Peake*, 1962(4) S.A. 288(C).

<sup>122</sup> S.A. Crim. Proc. Act, § 108 *bis* (1955), as inserted by Act No. 39, § 4 (1961), and amended by Act No. 76, § 17 (1962), Act No. 37, § 9 (1963), and Act No. 80, § 23 (1964).

<sup>123</sup> S.A. Crim. Proc. Act, § 87 (1955), as amended by Act No. 50, § 24 (1956); § 88; and § 98.

<sup>124</sup> S.A. Crim. Proc. Act, § 108 *bis*(5) (1955), as inserted by Act No. 39, § 4 (1961), and amended by Act No. 76, § 17 (1962), Act No. 37, § 9 (1963), Act No. 80, § 23 (1964) (extension until June 1, 1965).

<sup>125</sup> It may take quite some time for a preparatory examination to terminate. S.A. Crim. Proc. Act, § 78 (1955) provides in part:

(1) Where sufficient grounds do not appear for at once committing the accused for trial or for discharging him, and it appears to the magistrate probable that further evidence may become available, the magistrate may by warrant commit the accused for a period not exceeding fourteen days, for further examination.

(2) A committal for further examination may, if necessary, take place more than once upon sufficient cause appearing to the magistrate and such cause shall be expressed in the warrant of recommitment.

<sup>126</sup> S.A. Crim. Proc. Act, § 87 (1955), as amended by Act No. 50, § 24 (1956). *Swift and Harcourt*, 134-138.

<sup>127</sup> Of course, a prisoner may not be released on bail if the 1961 twelve-day no-bail legislation discussed above would thereby be contravened.

<sup>128</sup> S.A. Crim. Proc. Act, § 88 (1955):

Every person committed for trial or sentence in respect of any offence, except treason or murder, is entitled as soon as the warrant of committal for his trial or sentence is issued, to be released on bail: Provided that—

(a) where any person has been committed for trial or for sentence upon a

One of the most important of these provisos, added in 1955,<sup>129</sup> is that an accused is not entitled to bail where the magistrate "has reason to believe that notwithstanding any conditions of a recognizance, such person is not likely to appear as required or to comply with any condition imposed."<sup>130</sup> In determining whether to release a person on bail, it appears that great reliance is placed upon representations made by the attorney general.<sup>131</sup>

Normally, applications for bail are made initially to one of the magistrates,<sup>132</sup> but the judges of the Supreme Court have jurisdiction to entertain original applications<sup>133</sup> and to hear appeals as to decisions made by magistrates.<sup>134</sup> The law stipulates that excessive bail shall not be demanded.<sup>135</sup> Interestingly, in South Africa as in England,<sup>136</sup> there are no professional bondsmen or bonding companies.

#### IX. POLICE INTERROGATION, ADMISSIONS AND CONFESSIONS

To lay down guidelines relative to police questioning of non-suspects, suspects, and prisoners the South African judges in 1931 adopted "Judges' Rules"<sup>137</sup> similar to those in England. The standards

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charge of any such offence, the magistrate to whom application for bail is made, may, if he has reason to believe that notwithstanding any conditions of a recognizance, such person is not likely to appear as required or to comply with any condition imposed (without prejudice to such person's rights under section *ninety-seven*) refuse to admit him to bail;

(b) where any person has been committed for trial upon a charge of rape, the magistrate to whom application for bail is made, may (without prejudice to such person's rights under section *ninety-seven*) refuse to admit him to bail; and

(c) where a woman has been committed for trial upon a charge of having murdered her newly born child or where a person under sixteen years of age has been committed for trial on a charge of murder, the magistrate to whom application for bail is made, may admit such woman or person to bail.

<sup>129</sup> Act No. 29, § 18 (1955), which amended Act No. 31, § 99 (1917). Strauss, 188.

<sup>130</sup> S.A. Crim. Proc. Act, § 88(a) (1955).

<sup>131</sup> Gardiner and Lansdown, 259; Swift and Harcourt, 137.

<sup>132</sup> See S.A. Crim. Proc. Act, § 87 (1955), as amended by Act No. 50, § 24 (1956), and 88-92. See also § 105(2)(a) as to power of policemen to fix bail and release on bail under certain circumstances.

<sup>133</sup> S.A. Crim. Proc. Act, § 98 (1955).

<sup>134</sup> *Id.* at § 97.

<sup>135</sup> *Id.* at § 96.

<sup>136</sup> Orfield, *Criminal Procedure from Arrest to Appeal* 104 (1947).

<sup>137</sup> The South African Judges' Rules as set forth in Gardiner and Lansdown, 613-614, provide:

(1) Questions may be put by policemen to persons whom they do not suspect of being concerned in the commission of the crime under investigation, without any caution being first administered.

(2) Questions may be put to a person whom the police have decided to arrest or who is under suspicion where it is possible that the person by his answers may afford information which may tend to establish his innocence, as, for instance, where he has been found in possession of property suspected

set forth are high, and the Rules were issued to the police by the Department of Justice as administrative directives.<sup>138</sup> But it must be emphasized that the Judges' Rules are not law and have no direct bearing upon the admissibility of evidence.<sup>139</sup> These Rules, carrying the imprimatur of both the judiciary and the executive, are demand-

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to have been stolen, or of an instrument suspected to have been used in the commission of the crime, or where he was seen in the vicinity about the time when a crime was committed. In such a case caution should first be administered. Questions, the sole purpose of which is that the answers may afford evidence against the person suspected, should not be put.

(3) The caution to be administered in terms of rule 2 should be to the following effect: "I am a police officer. I am making inquiries (into so and so) and I want to know anything you can tell me about it. It is a serious matter and I must warn you to be careful what you say." Where there is any special matter as to which an explanation is desired, the officer should add words such as: "You have been found in possession of . . . and unless you can explain this I may have to arrest you."

(4) Questions should not be put to a person in custody with the exception of questions put in terms of rule (7).

(5) Where a person in custody wishes to volunteer a statement, he should be allowed to make it, but he should first be cautioned.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence, merely by reason of no caution having been given prior to the commencement of his statement, but in such a case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, but questions may be put to him solely for the purpose of removing elementary or obvious ambiguities in voluntary statements. For instance, if he has mentioned an hour without saying whether it was morning or evening or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) The caution to be administered to a person in custody should be to the following effect:

(a) *Where he is formally charged:*

"Do you wish to say anything in answer to the charge? You are not obliged to do so, but whatever you say will be taken down in writing and may be used in evidence."

(b) *Where a prisoner volunteers a statement otherwise than on a formal charge:*

"Before you say anything (or, if he has already commenced his statement, "anything further"), I must tell you that you are not obliged to do so, but whatever you say will be taken down in writing and may be given in evidence."

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and in the language in which it was made. It should be read over to the person making it, and he should be given full opportunity for making any corrections therein that he may wish to and he should then be invited to sign it.

(10) When two or more persons are charged with the same offence, and a voluntary statement is made by any one of them, the police, if they consider it desirable, may furnish each of the other persons with a copy of such statement, but nothing should be said or done by the police to invite a reply. The police should not read such statement to a person furnished, unless such person is unable to read it and desires that it be read over to him. If a person so furnished desires to make a voluntary statement in reply, the usual caution should be administered.

<sup>138</sup> See Swift and Harcourt, 370; Hoffman, 344.

<sup>139</sup> See Swift and Harcourt, 371.

ing indeed; they stipulate that, except "for the purpose of removing elementary or obvious ambiguities in voluntary statements,"<sup>140</sup> questions "should not be put to a person in custody."<sup>141</sup> Are these provisions complied with in practice? It appears to this writer that they are not, and that interactions between evidentiary rules and statutory enactments afford the police tempting opportunities to violate them.<sup>142</sup> Putting to one side the extreme "90-day detention clause," discussed hereafter,<sup>143</sup> there is, for example, the authority to hold in custody a person arrested without a warrant for up to forty-eight hours before charging him—a most convenient period for interrogation.<sup>144</sup>

Then, too, there are opportunities produced by the interaction between the law and practice relative to bail<sup>145</sup> and relative to right to counsel.<sup>146</sup> Under the law governing the admissibility of confessions and admissions it is clear that evidence obtained in contravention of the Judges' Rules is not necessarily inadmissible,<sup>147</sup> although violations may affect the exercise of judicial discretion to exclude evidence.<sup>148</sup> It does not appear, however, that unaggravated police questioning of a person in custody would, in and of itself, be sufficient to cause the court to exclude evidence.<sup>149</sup> One text writer indicates that only such questioning as amounts to "browbeating" would result in exclusion.<sup>150</sup> The legal test for determining the admissibility of an admission is the traditional one, whether it was freely and voluntarily made,<sup>151</sup> not whether the provisions of the Judges' Rules were complied with. Even if the Judges' Rules were law, free and voluntary

<sup>140</sup> Rule 7, South African Judges' Rules, note 137 *supra*.

<sup>141</sup> Rule 4, South African Judges' Rules, note 137 *supra*.

<sup>142</sup> A prominent judge of a superior court, discussing Rule 2 of the Judges' Rules (see note 137 *supra*) has stated:

The caution is now prescribed by Judges' Rule No. 2, which requires it to be administered as soon as the police have decided to arrest. And then, too, questions of which the sole purpose is that the answers may afford evidence against the person about to be arrested may not be put. A rule so difficult of observance must inevitably become a dead letter, and I believe that it has, both here and in England.

He later goes on to conclude that "the judges themselves have emasculated the Judges' Rules." Hiemstra, *Abolition of the Right Not to Be Questioned*, 81 S.A.L.J. 187, 206 (1964).

<sup>143</sup> See discussion accompanying notes 173-190 *infra*.

<sup>144</sup> See discussion accompanying notes 56-57 *supra* as to right to counsel and notes 105-106 *supra* as to arrest. See Wides, *An Arrested Person's Right of Access to His Lawyer—A Necessary Restatement of the Law*, 81 S.A.L.J. 513 (1964).

<sup>145</sup> See discussion accompanying notes 122-136 *supra*.

<sup>146</sup> See discussion accompanying notes 50-68 *supra*.

<sup>147</sup> *R. v. Holtzhausen*, 1947(1) S.A. 567(A.D.); Hoffman, 344; O'Dowd, *The Law of Evidence in South Africa* 52-53 (1963).

<sup>148</sup> See the discussion and the cases cited in Hoffman, 344 and Gardiner and Lansdown, 612-615.

<sup>149</sup> See Hoffman, 344; O'Dowd, *The Law of Evidence in South Africa* 52-53 (1963); Swift and Harcourt, 368.

<sup>150</sup> O'Dowd, *The Law of Evidence in South Africa* 52-53 (1963).

<sup>151</sup> Hoffman, 341-342.



admissions obtained in violation of them would not necessarily be inadmissible, for, as noted above, South Africa follows the traditional rule that illegally-obtained evidence is generally nonetheless admissible.<sup>152</sup> Evidence obtained as the result of an inadmissible admission is usually admissible,<sup>153</sup> a powerful incentive to violate the Judges' Rules.

South African statutes relative to confessions present a strange coupling of what appear, on the one hand, to be extreme safeguards for the prisoner and, on the other, to be tempting rewards for improper police practices. In one section the law stipulates that *no* confessions to a peace officer other than a magistrate or justice will be admissible in evidence unless "confirmed and reduced to writing in the presence of a magistrate or justice."<sup>154</sup> This unusual provision first appeared in South Africa in 1917.<sup>155</sup> It has been the subject of much criticism by both the courts and the commentators<sup>156</sup> and has been interpreted quite strictly.<sup>157</sup> Since the rule applies only to confessions and not to admissions, the narrow interpretation given to the term "confessions" greatly restricts the reach of the provision. It is felt by some, including members of the bench, that, although

<sup>152</sup> See note 118 *supra* and accompanying text.

<sup>153</sup> S.A. Crim. Proc. Act, § 245(1) (1955), quoted in text accompanying note 159 *infra*; *R. v. Samhando*, 1943 A.D. 608; *Hoffman*, 344-345; May, *South African Cases and Statutes on Evidence* 104-109 (1962).

<sup>154</sup> S.A. Crim. Proc. Act, § 244 (1955), provides in its entirety as follows:

(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person charged with such offence, whether before or after his arrest and whether on a judicial examination or after committal, and whether reduced into writing or not, be admissible in evidence against such person provided such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto: Provided that if such confession is shown to have been made to a peace officer, other than a magistrate or justice, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or justice: Provided further that if such confession has been made at a preparatory examination before any magistrate, such person has previously, according to law, been cautioned by the magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.

(2) In any proceedings any confession which is, by virtue of any provision of sub-section (1), inadmissible in evidence against the person who made it, shall become admissible against him if he or his representative adduces in those proceedings any evidence, either directly or in cross-examining a witness, of any statement, verbal or in writing, made by the person who made the confession either as part thereof or in connection therewith, if such evidence is, in the opinion of the officer presiding at such proceedings, favorable to the person who made the confession.

<sup>155</sup> *Hoffmann*, 345.

<sup>156</sup> See *Hoffmann*, 353-354; May, *South African Cases and Statutes on Evidence* 99-101 (1962).

<sup>157</sup> *Hoffmann*, 346-350, 353-354.

designed, at least in part, for the prevention of improper police conduct, the provision may at times facilitate it, for in practice the confirmation before a magistrate may result in the "dropping of a veil" over what has gone before.<sup>158</sup>

Immediately after the section setting forth the requirements for the admissibility of a confession<sup>159</sup> appears the following:

(1) Evidence may be admitted of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or evidence which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.

(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against him on such trial.<sup>160</sup>

The second paragraph of the quoted section came into the law by statute in 1955<sup>161</sup> to effect an overruling of cases taking a contrary position.<sup>162</sup> Thus, in one section<sup>163</sup> Parliament details the requirements for the admissibility of a confession (in some instances appearing to give the accused extraordinary protection) and then, in the very succeeding section, describes the tempting fruits that may be successfully garnered by improper practices.

## X. PRIVILEGE AGAINST SELF-INCRIMINATION

Present South African law relative to the privilege against self-incrimination bears strong resemblance to our own.<sup>164</sup> Recently, however, a prominent justice of a South African superior court has

<sup>158</sup> See *R. v. Gumede*, 1942 A.D. 398, 433, and the discussion and cases collected in Gardiner and Lansdown, 616-618, and May, *South African Cases and Statutes on Evidence* 99-101 (1962).

<sup>159</sup> See note 154 *supra*.

<sup>160</sup> S.A. Crim. Proc. Act, § 245 (1955).

<sup>161</sup> Act No. 29, § 42 (1955).

<sup>162</sup> May, *South African Cases and Statutes on Evidence* 104-109 (1962). The new statute, however, seems to be given a narrow interpretation by the courts. See *R. v. Nhleko*, 1960(4) S.A. 712 (A.D.).

<sup>163</sup> S.A. Crim. Proc. Act, § 244 (1955), quoted at note 154 *supra*.

<sup>164</sup> See S.A. Crim. Proc. Act, § 231, and § 234 (1955), as amended by Act No. 92, § 20 (1963); O'Dowd, *The Law of Evidence in South Africa* 94-96 (1963); Hoffmann, 244-247. For flagrant invasion of the right, see discussion of the 90-day clause accompanying notes 173-190 *infra*.

made far-reaching proposals which, if adopted, would bring about drastic changes in the law.<sup>165</sup>

Feeling that the present law is "over-generous to the accused,"<sup>166</sup> Mr. Justice Hiemstra proposes the abolition of "the right not to be questioned" and the institution of a system under which an accused could be subjected to pretrial, judicially-controlled interrogation. At the time of this interrogation, the accused would not be placed under oath and hence would not be subject to perjury prosecution for false statements. Although the accused would be told that he has no statutory duty to reply, he would also be informed that, should he fail to respond, an inference could be drawn from his silence if he should be subsequently tried. The accused would have the right to have his legal advisor present at this pre-trial interrogation and to other safeguards. The author states that he would abolish only the right not to be questioned and would retain the "right not to answer."<sup>167</sup> The plan would, of course, strongly encourage the non-exercise of the latter right.

The author also proposes abolition of important limitations ostensibly placed upon police questioning by the Judges' Rules,<sup>168</sup> salient provisions of which he characterizes as "dead letter."<sup>169</sup> He suggests further that compulsory disclosure by an accused of documents in his possession ought to be considered.<sup>170</sup>

Mr. Justice Hiemstra's proposals are the subject of considerable controversy and serious opposition within both the bench and bar. It was reported that the Minister of Justice circulated among the members of the legal profession copies of a draft bill generally following the lines suggested by Mr. Justice Hiemstra.<sup>171</sup> The General Council of the Bar of South Africa unanimously adopted a resolution that it was completely opposed to the plan.<sup>172</sup> It will be very interesting to watch further developments, if any, in this area.

#### XI. 90-DAY DETENTION CLAUSE

In 1963 the South African Parliament adopted the 90-day detention law,<sup>173</sup> a measure so drastic that in its sphere of operation it

<sup>165</sup> Hiemstra, *Abolition of the Right Not to Be Questioned*, 81 S.A.L.J. 187 (1964). Since the publication of Mr. Justice Hiemstra's article, he has somewhat modified the details of his proposals, but the basic plan remains much the same.

<sup>166</sup> Hiemstra, *Abolition of the Right Not to Be Questioned*, 81 S.A.L.J. 187 (1964).

<sup>167</sup> *Id.* at 194.

<sup>168</sup> *Id.* at 205-209, 216-217.

<sup>169</sup> *Id.* at 206.

<sup>170</sup> *Id.* at 218.

<sup>171</sup> *Rand Judge to Fly to City for Talks*, The Cape Times 3 (Oct. 1, 1964).

<sup>172</sup> *Ibid.*

<sup>173</sup> Act No. 37, § 17 (1963).

undercuts many of the most cherished principles of criminal procedure and liberty under law. During the period of its operation the clause authorizes any commissioned officer to arrest without warrant any person he reasonably suspects of committing or intending to commit certain political offenses,<sup>174</sup> or anyone who "in his opinion" possesses information with respect to the commission of such crimes. The officer is authorized to detain such person for interrogation in connection with such crimes at any place he thinks fit, until in the opinion of the Commissioner of South African Police the detainee has answered all such questions "satisfactorily." The law provides, however, that "on any particular occasion when he is so arrested" the detainee shall not be kept longer than ninety days. The 90-day limitation is somewhat illusory, for at the conclusion of this period detainees may be, and at times have been, immediately rearrested.<sup>175</sup>

The law stipulates that, except for a weekly visit by a magistrate, no one shall have access to the detainee during the period of detention, except with permission of the Minister of Justice or the com-

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<sup>174</sup> Act No. 37, § 17 (1963):

(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section *one* of the Police Act, 1958 (Act No. 7 of 1958), may from time to time without warrant arrest or cause to be arrested any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under the Suppression of Communism Act, 1950 (Act No. 44 of 1950), or under the last-mentioned Act as applied by the Unlawful Organizations Act, 1960 (Act No. 34 of 1960), or the offence of sabotage, or who in his opinion is in possession of any information relating to the commission of any such offence or the intention to commit any such offence, and detain such person or cause him to be detained in custody for interrogation in connection with the commission of or intention to commit such offence, at any place he may think fit, until such person has in the opinion of the Commissioner of the South African Police replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than ninety days on any particular occasion when he is so arrested.

(2) No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under sub-section (1): Provided that not less than once during each week such person shall be visited in private by the magistrate or an additional or assistant magistrate of the district in which he is detained.

(3) No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody.

(4) (a) Subject to the provisions of paragraphs (b) and (c), sub-sections (1) to (3), inclusive, shall be in operation until the thirtieth day of June, 1964, and for such periods thereafter not exceeding twelve months at a time as the State President may from time to time by proclamation in the *Gazette* determine.

(b) Any proclamation under paragraph (a) may be issued at any time whether or not the said sub-sections have then ceased to be in operation.

(c) The State President may at any time by like proclamation suspend the operation of the said sub-sections or withdraw any proclamation issued under paragraph (a).

<sup>175</sup> *Loza v. Police Station Commander, Durbanville*, 1964(2) S.A. 545 (A.D.).

missioned officer. Thus, there is clearly no right to advice of counsel during the detention.<sup>176</sup> The courts are expressly prohibited from ordering the release of any person detained under the section, and of course bail has no place whatsoever in the scheme. As recognized by the courts, the purpose of the law is to induce the detainee to reply satisfactorily to all the questions put to him,<sup>177</sup> a clear infringement of the privilege against self-incrimination.<sup>178</sup>

The measure, of course, constitutes a distinct departure from the Judges' Rules;<sup>179</sup> its purpose is police interrogation of detainees. When called upon to rule as to the admissibility of statements given during detention, the court held that despite the legal or statutory compulsion the statements, if otherwise free and voluntary, are admissible.<sup>180</sup>

There have been numerous allegations of police brutality and ill treatment. Apparently, detainees are frequently held in solitary confinement in a small cell<sup>181</sup> and denied reading matter or writing materials.<sup>182</sup> At one time it appears that there were 686 persons held under such detention.<sup>183</sup> In view of parliamentary supremacy, there is no question of the constitutionality of the measure.<sup>184</sup> It is not surprising that the clause has been an effective instrument in stamping out anti-government activity.<sup>185</sup> Such powers no doubt make police investigation much easier.

With respect to this clause and the other extreme provisions contained in the 1963 General Law Amendment Bill the Johannesburg Bar Council, in a public statement, declared that the measures would "have as their consequence the virtual abrogation of the rule of law in South Africa."<sup>186</sup>

Going into effect on May 1, 1963, the clause remained in operation until January 11, 1965, when it was suspended as the result of proclamation by the State President.<sup>187</sup> The authorization remains on the books, however, and on proclamation by the State President

<sup>176</sup> *Rossouw v. Sachs*, 1964(2) S.A. 551, 558-559 (A.D.).

<sup>177</sup> *Id.* at 561.

<sup>178</sup> *Id.* at 558-559. *S. v. Hlekani*, 1964(4) S.A. 429, 433-434 (A.D.).

<sup>179</sup> See discussion accompanying notes 137-163 *supra*.

<sup>180</sup> *S. v. Hlekani*, 1964(4) S.A. 429 (A.D.).

<sup>181</sup> See *How Solitary Confinement Affects Prisoners*, *The Cape Times* 12 (Nov. 12, 1963).

<sup>182</sup> *Rossouw v. Sachs*, 1964(2) S.A. 551, 556 (A.D.). It appears, however, that they are given two half-hour periods of exercise a day. *Rossouw v. Sachs*, *supra* at 557.

<sup>183</sup> 90-Day 'Torture' Claim: 'No Inquiry' Says Vorster, *The Cape Times* 8 (March 12, 1964).

<sup>184</sup> See notes 9-15 *supra* and accompanying text.

<sup>185</sup> *No Detentions Without Cause, Says Vorster*, *The Cape Argus* 11 (Dec. 5, 1964).

<sup>186</sup> *Bill Ends 'Rule of Law'*, *The Cape Times* 5 (April 30, 1963).

<sup>187</sup> *Government Gazette Extraordinary*, Vol. XIV, No. 960, November 30, 1964.

would again go into operation.<sup>188</sup> The clause apparently had proved quite effective, and in connection with the suspension the Minister of Justice said, "If it had not been for the energetic way in which the police fulfilled their task and the measures adopted by the Government to combat the subversive elements, these people would have gone a long way to achieve their aims."<sup>189</sup> He made it clear, however, that "if circumstances warranted it," the provision would be brought back into operation immediately.<sup>190</sup>

## XII. CONCLUSION

Although the mother law of both South Africa and the United States in the area of criminal procedure and evidence is the English Common Law, it is clear that in many of the areas discussed above there is today great divergence between the two systems. The United States Supreme Court is displaying great concern for the rights and privileges of every citizen regardless of race, color, creed, or economic status. By recent landmark decisions<sup>191</sup> the American society is being forced to provide yet further implementation of traditional notions of equality before the law, and law enforcement personnel are being required to abide by the law which they enforce. We are told that these decisions make it much more difficult for the authorities to afford society the protection it needs, and this may well be true. But certainly there is merit in the principle that the police should themselves abide by the law, and in the notion that poverty should not deprive one of the practical enjoyment of rights and privileges under the Constitution. If society cannot be adequately protected without violation of the law by the police, then something is wrong either with the law or with society.

In South Africa, to achieve the protection Parliament feels is needed, the law, as we have seen, gives law enforcement personnel very broad powers in a variety of areas. In adopting drastic measures the South African Parliament reflects a willingness to change the law, an unwillingness to see society changed.

<sup>188</sup> For the clause's provisions relative to periods of operation, see note 174 *supra*.

<sup>189</sup> *No Detentions Without Cause, Says Vorster*, *The Cape Argus* 11 (Dec. 5, 1964).

<sup>190</sup> *Ibid.*

<sup>191</sup> See, for example, *Escobedo v. Illinois*, 378 U.S. 478 (1964) (right of arrested person to advice of counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent to appointed counsel); *Douglas v. California*, 372 U.S. 353 (1963) (right of indigent to appointed counsel on appeal); *Mapp v. Ohio*, 367 U.S. 643 (1961) (inadmissibility of evidence obtained as the result of unconstitutional searches and seizures); and in the federal area, *Mallory v. U.S.*, 354 U.S. 449 (1957) (inadmissibility of statements made during period of illegal detention where following an arrest a prisoner is not brought "without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States" as required by rule 5(a) of the Federal Rules of Criminal Procedure).